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CONDITIONAL SALES CONTRACTS MADE WITHIN PREFERENTIAL PERIOD OF BANKRUPTCY ACT.

The Federal Supreme Court did not have before it the precise question of the right of a vendor in a conditional sales contract, with possession in vendee made within four months prior to vendee's bankruptcy, independently of its being recorded at the time of bankruptcy. It did hold, however, where such a contract was made more than four months prior to vendee's bankruptcy and later recorded within such period, that the trustee acquired no lien as against the right of the vendor to retake possession. Bailey v. Baker Ice Machine Co., 36 Sup. Ct. 50.

The reasoning followed by Mr. Justice Van Devanter, speaking for a unanimous court, leaves in doubt whether similar recognition of vendor's rights in the proposition first above set forth would be accorded.

The opinion speaks of the rule in Kansas as holding for a distinction between a conditional sale and an absolute sale with mortgage back, and under this distinction in Kansas, there is no inconsistency "with the retention of title in the vendor pending payment of the notes" given for purchase price of an article conditionally sold. What effect the bankruptcy act would have under rulings that such a contract amounted to an absolute sale with mortgage back is not determined. However, the reasoning implies that both the making and recording of such contracts should antedate the four months' preferential period in jurisdictions not recognizing the Kansas rule.

In the Bailey case conditional sales being recognized in the entirety of their provisions, the learned justice discusses the effect of the conditional sales contract, though made prior to the four months' period, yet not being filed for record until within that time.

It is said: "The question next to be considered is whether the contract operated as a preferential transfer by Grant Brothers within the meaning of § 60b of the bankruptcy act * * * which declares that 'a transfer' by a bankrupt 'of any of his property' shall be voidable by the trustee, if it be made or recorded (when recording is required) within four months before the petition in bankruptcy is filed, and 'the bankrupt be insolvent and the * * * transfer then operates as a preference,' etc. The section leaves no doubt that to be within its terms the transfer must be one which a bankrupt makes of his own property and which operates to prefer one creditor over another." Here follows allusion to other portions of the bankruptcy act as confirming this view, and the conclusion is drawn that "it is plain that § 60b refers to an act on the part of a bankrupt whereby he surrenders or encumbers his property or some part of it for the benefit of a particular creditor, and thereby diminishes the estate which the bankruptcy act seeks to apply for the benefit of all the creditors."

It is further said that the property in question was not the bankrupt's, but that of the conditional vendor, no ownership being transferred, but only possession, but "no doubt the right to perform it (the contract) and thereby to acquire the ownership was a property right. But this right was not surrendered or encumbered. On the contrary, it remained with the bankrupt and ultimately passed to the trustee, who was free to exercise it for the benefit of the creditors."

But it also is true that a contract of this kind makes the property subject to any lien fastened on it in a suit against the vendee prior to recording. The question then comes up whether the preferential period relates back so as to cut out as ineffective a recording within that period. To say it does not, seems to give creditors fastening a lien an advantage over the trustee, not-

withstanding this very lien might be upset, generally speaking, in favor of the trustee.

This is on the theory that by statute, possession is conclusive evidence of property, where there has been no recording so far as creditors are concerned.

There is next referred to § 47a, clause 2, which provides that a trustee "as to all property in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings." Does this provision travel back through the preferential period or not? The court ruled that it did not, as "the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed."

It must be conceded that this is true generally, but the question here was of exceptional instances of transfers within the preferential period. These are embraced by relation forward so as to come within "the condition of the bankrupt estate as of the time at which the petition was filed. Possession is evidence conclusive of title until recording and recording was not to cut out the whole or a part of that relation period.

It seems strange that this would depend upon state construction as to whether such contracts were regarded as conditional sales or as transfer of title with mortgage back. Bankruptcy act regarded in a practical way ought not to take into account a refinement like this, especially as by this ruling, there is not recognized the presumption of property in the bankrupt by the failure of the conditional vendor to record his contract.

We repeat that failure to record so far as ordinary creditors are concerned, virtually makes possession conclusive as to title, but the ruling is that this is not so as to a trustee in bankruptcy. Therefore it is a little hard to see that the trustee is given the rights of a creditor claiming a lien.

NOTES OF IMPORTANT DECISIONS.

CRIMINAL LAW.—CONVICTION OF LOWER KINDRED OFFENSE CHARGED IN INDICTMENT.—South Dakota statute provides that "the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an intent to commit the offense." Under an indictment charging a defendant with the crime of assault with intent to do great bodily injury, no battery or personal violence was charged. Defendant was convicted of assault and battery and the Supreme Court of that state sustained the conviction. State v. Cotton, 155 N. W. 8.

This conviction was in accordance with instructions by the trial court, and the Supreme Court affirms the case upon the theory that though "battery" was not necessarily included in the indictment, but a simple assault was, yet as the statute prescribes the same maximum punishment for an assault as for an assault and battery, a verdict for the latter offense "could not, in any possible manner, prejudice the legal rights of the accused. * * * Whether the unauthorized verdict finding the accused guilty of a crime not charged be called surplusage (as contended) is immaterial. It is merely void and cannot prejudice any of appellant's legal rights."

The logic of this decision is that one may be charged with a simple assault and be found guilty of another offense, if it fortuitously happen that the punishment for the two is the same. Assault and assault and battery are two as distinctly different offenses as are burglary and larceny, and while there may be burglary with intent to commit a felony, we do not think it true that under indictment, say for burglary with intent to commit a felony, e. g., rape, a defendant could be convicted of intent to commit rape.

That, however, would not be going quite as far as the South Dakota court goes in this case. There is an unlawful intent in an unlawful assault, while in assault and battery intent is swallowed up in criminal execution. To say assault and battery is but a form of speech, as unlawful battery comprises assault as part and parcel of the battery. There could be no battery without the assault. But, if the statute said assault and unlawful battery should be punished in the same way, it would be more evident instruction should not have told the jury the defendant could be found guilty of battery as an inclusive offense, when

ing but an assault was charged. Instructions are, in principle, deemed harmless when they are calculated to divert the jury to the consideration of an offense as to which a defendant is not on trial.

EMINENT DOMAIN—DAMAGES INCREASED BY USE OF PROPERTY WITH OTHER PROPERTY.—The question of proper elements in damages was considered in a condemnation case in the Federal Supreme Court, City of New York v. Sage, 36 Sup. Ct. 25.

It was said that "upon an inspection of the record it appears to us, as the language of the commissioners on its face suggests, that their report does not mean that the claimant's land had a market value of $11,948.90—that it would have brought that sum at a fair sale—but that they considered the value of the reservoir (for which it was taken) as a whole and allowed what they thought a fair proportion of the increase, over and above the market value of the lot to the owner of the land."

Holding this view erroneous, the court goes on to say: "The decisions appear to us to have made the principles plain. No doubt, when this class of questions first arose, it was said in a general way that adaptability to the purpose for which the land could be used most profitably was to be considered; and that is true. But it is to be considered only as far as the property would have been offered for sale in the absence of the city's exercise of the power of eminent domain. The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots. The city is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable as has been attempted except by the intervention of eminent domain. Any rise in value before the taking, not caused by expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give." This rule of damages would seem, or might be, difficult, sometimes to work out. It would be easier where an entire tract under one ownership was to suffice for the whole taking contemplated. If there are separate ownerships the condemnation of some, or the contemplated condemnation of some, legitimately might appear to enhance the profitable use of other parts. If untaken property increases in price in view of a contemplated public work, why should not that which is taken? All market conditions are not what in ordinary times could be considered "fair," so far as in and about the contemplated improvement is concerned.

PRINCIPAL AND SURETY—RULE STRICTISSIMI JURIS NOT APPLICABLE TO CORPORATE SURETY.—In McKegney v. Illinois Surety Co., 155 N. Y. Supp. 1041, decided by Appellate Division of New York Supreme Court, it was held, that requirement that notice of default of principal should be sent by registered letter to the home office of a foreign corporation within 48 hours afterward, did not on failure so to do prevent recovery, where notice by ordinary mail was sent to its New York office within such period, this ruling being by three of the five judges, two dissenting.

The trial court's ruling in favor of the surety company was said to have "pushed the rule of strictissimi juris too far," because "the purpose of the clause * * is to insure prompt notice to the surety of a default on the part of the contractor. Just how the notice is given is immaterial, so long as it is given and is received within the time specified in the contract." The objection was spoken of as being "too meticulous and frivolous to warrant serious consideration."

It is said, quoting from U. S. F. D. Co. v. U. S., 191 U. S., 191 U. S. 416, that "the rule of strictissimi juris is a stringent one and is liable at times to work a practical injustice, and ought not to be extended to contracts not within the reason of the rule, particularly when the bond" is undertaken for a profit.

But the dissentients contend that the requirement did extend to the contract by express agreement and the principle invoked has nothing to do with this case, the surety company at least having the right to contract in regard to "when, where and in what manner the notice should be given," and we do not see why it could not make something otherwise not a matter of substance to become such. It was fair, however, for the majority to construe the clause and say what was its purpose. The words of this clause seem, however, so plain as not to call for construction.

THE DOCTRINE OF SIMPLE TOOLS.

Introductory.—In the consideration of this subject one should bear in mind that no person is ever relieved of the duty to exercise reasonable care, in the circumstances of the given situation, for the safety of others who are acting within their rights and whose safety may be endangered by his conduct; and that an employer is not excepted from this rule. The employer is required at all times, and in all circumstances, to exercise reasonable care for the safety of his employes. What this requires of him in a given instance depends upon the circumstances—the dangerous character of the tools and appliances with which his employes are required to work. For instance, in the case of very dangerous appliances, the employer is required to take a great many precautions to guard his employes against being injured; while in the use of common, simple tools his duties are few and easily performed.

Duty of Employer Generally.—There can be no doubt that it is the duty of the employer to exercise ordinary care to furnish his employes with reasonably safe tools, and to exercise ordinary care to maintain them in a reasonably safe condition, regardless of whether they are, or are not, simple tools.[1]

The contrary, however, has been held in the following language: "The 'common' tool rule may be said to be a relaxation of the general rule, which makes it the duty of a master to exercise reasonable care to provide reasonably safe tools and appliances for his servants, since the general rule has no application where the tools and appliances furnished are of simple nature, easily understood, and in which the defects, if any, can be easily and readily observed by the servant. * * * It is onlv in cases of machinery and appliances which are recognized as being in their nature dangerous to employes using them, that the employer owes the duty to the employe of looking out for his safety."[2]

The Missouri case of Harris v. Kansas City S. R. Co., *supra,* after laying down the rule in accordance with the view first above stated, continued as follows: "Unless it be in a case where the appliance and the contemplated use thereof are so very simple and commonplace that an ordinarily prudent person would not reasonably anticipate the danger entailed." These facts, however, merely bear upon the question of what constitutes reasonable care, and not upon whether reasonable care is a duty owed to the employe.

Duty and liability must be distinguished in this respect. The employer may be relieved from liability for a negligent act by the contributory negligence of the injured employe, but his duty was and is the same regardless of the question of liability.

Duty of Employer to Inspect Simple Tools.—The general rule is that an employer is required, not only to exercise ordinary care to provide reasonably safe and suitable tools and appliances for the use of the servant in the first instance, but to make such reasonable inspection thereof from time to time as the nature of the use and the character of the tool or appliance may require to keep it in reasonably safe condition for their intended use.[3]

However; the courts have adopted, as an exception hereto, the rule that employers owe no duty to inspect simple tools.[4]

It is held to be a part of the doctrine of assumption of risks that the duty of in-

(1) Harris v. Kansas City S. R. Co., 146 Mo. App. 524, 124 S. W. 576; Philip Carey Roofing & Mfg. Co. v. Black, Tenn., 1914, 164 S. W. 1183.

(2) Ohio Valley R. Co. v. Copley, Ky., 1914, 166 S. W. 625.

(3) Sullivan v. Indianapolis, C. & W. Traction Co., Ind. App., 1914, 103 N. E. 860.

(4) Herricks v. Chicago & E. I. R. Co., 257 Ill. 264; Stirling Coal & Coke Co. v. Fork, 141 Ky. 40, 131 S. W. 1030, 40 L. R. A. (N. S.) 837; Cooney v. Portland Terminal Co., Me., 1914, 92 Atl. 178; Wachsmuth v. Shaw Electric Crane Co., 118 Mich. 275, 76 N. W. 497; Koschman v. Ash, 98 Minn. 312, 108 N. W. 514, 116 Am. St. Rep. 373; Miller v. Erie R. Co., 21 App. Div. 45, 47 N. Y. Supp. 285; Chicago, R. I. & P. R. Co. v. Lillard, Okla., 1914, 141 Pac. 8; O'Brien v. Missouri, K. & T. R. Co., 36 Tex. Civ. App. 528, 82 S. W. 319; Bougas v. Eschbach-Bruce Co., 77 Wash. 347, 137 Pac. 472.

spection by an employer, of the appliances used by his employes, does not extend to the small and common tools in every day use; "of the fitness of which the employes using them may reasonably be supposed to be competent judges."[5]

In Longpre v. Big Blackfoot Milling Co.[6] the court said: "It is not the duty of a railroad company or other persons engaged in great industrial enterprises to inspect, much less to test, every tool or appliance put into the hands of an employe. This duty arises only when the appliance is of such a character that a man of ordinary prudence would, under the same circumstances, make the inspection as a precaution against injury to his servant. The master is not required to inspect simple appliances, such as hammers, saws, spades, hoes, lanterns, push sticks, and the like, the character and use of which are understood by all alike. A tool of this class is so simple in its construction and so well understood by men of ordinary intelligence that it would seem absurd to say that the master should make a careful inspection of it before he commits it to the hands of his servant, who has the same capacity to understand its character and uses that he himself has."

A carpenter, with four or five years' experience, was injured by a small piece of steel flying from the head of a chisel, which, with a hammer, he was using to cut rivets, and striking him in the eye. It appeared that he frequently used a chisel in the same manner, and that the head of the chisel was battered and "mushroomed." It was held that the employer was under no obligation to inspect the chisel, the condition of which would ordinarily be as apparent to an employe as it would be to an employer, and the risk of particles flying from a chisel when struck by a hammer would be so obvious to an ordinarily intelligent and experienced mechanic such as the plaintiff was that he should be deemed to have assumed it.[7]

It has been held that an employer owes no duty to inspect a pick which was reasonably fit in the first instance.[8]

The duty of inspection, however, arises from the primary obligation to exercise ordinary diligence to provide safe instrumentalities. Whenever an inspection is fairly incidental to such diligence, it must be made.[9]

The question is not whether the employer owes the duty of reasonable care, that duty he always owes, but whether the duty of reasonable care requires that inspection of the tools be made.

Duty of Employe.—The rule that all persons must exercise reasonable care for their own safety applies to employes in the use of simple tools. This is the extent of his duty, however. He is bound to take notice only of defects open to the observation of a reasonably prudent person.[10]

He is not bound to look for hidden or latent defects or dangers or for those requiring special skill, for their detection, which he does not possess. He may rely upon the safety of the implements, machinery, and appliances provided by the master, for his use in rendering the services contemplated by his employment, unless the defects and dangers are such as may be ascertained by an ordinarily prudent man in the exercise of ordinary care for his own safety.[11]

It has been declared that a cant hook is a simple tool or appliance, but that it could not be held, as a matter of law, that any defective condition thereof is so obvious that the employe using the same is charged with notice of it. "The defect," said the court, "might readily have been discovered if search had been made, but plaintiff was

(5) Golden v. Ellis, 104 Me. 177, 71 Atl. 649.
(6) 38 Mont. 99, 99 Pac. 131.
(7) Cooney v. Portland Terminal Co., Me., 1914, 92 Atl. 178.
(8) Toth v. Osceola Consol. Min. Co., Mich., 1914, 146 N. W. 668.
(9) Baker v. United Iron Wks. Co., 90 Kan. 430, 133 Pac. 737.
(10) St. Louis, I. M. & S. R. Co. v. Brown, Ark., 1914, 169 S. W. 940.
(11) Sullivan v. Indianapolis, C. & W. Traction Co., Ind. App., 1914, 103 N. E. 860.

not bound to search for defects. He was only bound in law to take notice of those defects which were open to the observation of a reasonably prudent man. The duty of inspection rested upon the master, and the servant, though bound to take notice of obvious defects, had the right, to some extent, to assume that the master had discharged his duty in exercising ordinary care to furnish a reasonably safe appliance."[12]

In the case of Crader v. St. Louis & S. F. R. Co.[13] it appeared that the plaintiff was injured by a particle of steel which flew from a pin maul, with which he was working, when it was struck by a hammer in the course of its use for the purpose intended. The court held that the doctrine of simple tools did not apply, "for the reason that the tool here in question inhered with a defect, if plaintiff's evidence be true, which plaintiff could not have discovered by such an examination thereof as he would be required to make to discover defects or insufficiencies therein."

In this respect the court continued: "There are many cases in which recovery has been denied the servant for injuries received by reason of defects or insufficiencies in common tools, as where the servant's means of knowledge was equal to or greater than that of the master, with respect to the condition of the tool, or where the servant was charged with a duty to repair. But obviously the instant case does not fall within the principles governing such cases."

It would seem to follow that the simple tools rule depends for its application upon the fact of an obvious defect, and not merely upon the fact of a common tool. The title of the rule, no doubt, is due to the fact that defects in simple tools are generally obvious.

Reason for the Simple Tools Rule.—The Court of Appeals of Kentucky has said: "The reason for exempting the master from liability in cases of this character rests upon the fact, well known to everybody, that deterioration being the necessary result of using a chisel, punch, cutter and similar tools for the purposes for which they are intended the duty of inspection and repair in such a case is incidental to the duty of the employes who use the tool in their common employment. The ordinary use of such a tool necessarily batters it, although that fact does not necessarily make it an unsafe tool."[14]

The foregoing reason for the rule is not at all satisfactory. The principles of law applicable to the use of simple tools are no different than those applicable to the use of other tools. The duty of inspecting tools, when inspection is necessary, is not taken from the employer and imposed upon the employe. The employe is under the duty only of observing such defects, and taking precautions against being injured thereby, as are obvious to him in the exercise of reasonable care.

The rule is evidently founded upon the fact, at least the supposed fact, that defects in a simple tool are obvious to all persons handling it, and if the employer was negligent in not discovering its defective condition and preventing its use by the employe, the employe was equally negligent, the defects being obvious to any prudent man, in failing to notice the condition of the tool and taking the necessary precautions against injury.

"The reason for the rule is that any defect in such simple tools or appliances would be as obvious to the servant as to the master, and the underlying reason in all the cases for holding the master accountable for injuries resulting from imperfect or defective tools and appliances is that the servant is ordinarily presumed to have no knowledge of the dangers incident to their use."[15]

(12) St. Louis, I. Mt. & S. R. Co. v. Brown, Ark., 1914, 169 S. W. 940.

(13) Mo. App., 1914, 164 S. W. 678.

(14) Ohio Valley R. Co. v. Copley, Ky., 1914, 166 S. W. 625.

(15) Vanderpool v. Partridge, 79 Neb. 165, 112 N. W. 318, 13 L. R. A. (N. S.) 668.

The duty of inspection is not imposed upon the employer in respect to simple tools, "because one using a tool of simple construction may readily discover for himself its defects and the possible dangers in using it."[16]

Following the reason for the rule, it appears that the rule is applicable only in respect of obvious defects. In regard to all other defects the question of the employer's liability depends upon the principles of law invoked for the determination of his liability for injuries caused by more complicated appliances.

Defect Known to Master.—Some courts renounce intention of holding that the simple tools rule applies in a case where the employer knew of the defective condition of a simple tool, and its condition was unknown to the servant. One court states that, "In such a case the master would be liable."[17]

It was so held in a case where an employe was injured while using a defective monkey-wrench, the defect being known to the employer and not known to the employe.[18]

"Although the master is not required to inspect simple tools, previously furnished to the employe, to discover defects of which the employe using such implement should be aware, and although generally no inspection of a simple tool may be necessary at the time it is delivered to an employe, yet if the master furnishes such a tool, with a dangerous defect of which he has actual knowledge, he is negligent. He should not be permitted to expose the servant to such a risk, particularly if the defect is of such a character that it might be overlooked by the servant."[19]

If the employer is under no duty to discover the defective condition of a simple tool, and if he does nothing to mislead the employe who is injured thereby, it is difficult to understand on what rational theory he can be held liable merely because he knew of a fact that he was not required to know.

Duty of Employer to Instruct and Warn Employe.—An employer is not required to instruct his employes, or warn them of dangers, or inquire as to the experience they have had, in the performance of simple duties, such as anyone with intelligence and sufficient strength can perform, and the dangers incidental to which are equally obvious to all men.[20]

The duty of an employer to warn or instruct an employe exists only where it is reasonably required for the latter's safety, on account of the dangerous character of the work or the experience of the employe. It has been held that an employer was not required to instruct an experienced man that a piece of steel may be broken off a battered cutter by the heavy blow of a hammer when, judging by his experience, he was fully aware of that fact.[21]

It is not necessary to warn an employe of an obvious danger or where no danger is to be anticipated.[22]

An employer, so it has been held, is under no duty to instruct an experienced workman, a foreigner, in regard to the danger from flying particles of rock, in the work of breaking large rocks by striking them with a pick.[23]

In this case the court said: "We think it must be said that it is a matter of common knowledge that, when a rock is struck with great force by any iron tool, whether sharp or dull, splinters are liable to fly as a result of the concussion. A man 33 years of age, who had spent his life in ordinary laborious occupations, could not reasonably be supposed to be ignorant upon

(16) Schumann v. International Harvester Co., 174 Ill. App. 140.

(17) So stated in Ohio Valley R. Co. v. Copley, Ky., 1914, 166 S. W. 625, 628.

(18) Mergenthaler-Horton Basket Co. v. Taylor, 28 Ky. L. Rep. 924, 90 S. W. 968.

(19) Philip Carey Roofing & Mfg. Co. v. Black, Tenn., 1914, 164 S. W. 1183.

(20) Jackson v. Schillinger Bros. Co., Mich., 1914, 148 N. W. 735.

(21) Lemieux v. Boston & M. R. Co., Mass., 1914, 106 N. E. 992.

(22) West Kentucky Coal Co. v. Kelley, 155 Ky. 552, 159 S. W. 1152.

(23) Toth v. Osceola Consol. Min. Co., Mich., 1914, 146 N. W. 668.

this point and require instruction. His ignorance of English or of the customs of the country would not make instructions necessary. The results of such a blow are so common as to be almost universal. Under such circumstances, the master is under no duty to warn the servant of a danger so common and obvious."

In one case it appeared that the plaintiff was an experienced carpenter, and that he had been employed in defendant's repair shops 4 or 5 years; that in the course of his work it became necessary occasionally to cut rivets with cold chisels, and that this work was customarily done by the carpenters as a part of their work; that on the occasion in question he needed a chisel for this purpose and, there being none available at the moment, his foreman told him to wait until another workman who was using one had finished with it; that he did so, and while he and another workman were cutting the rivets—one holding the chisel while the other struck it with a hammer—a piece of steel flew from the head of the chisel and struck him in the eye, inflicting the injury complained of; that the head of the chisel was somewhat battered. It was held that the employer was under no duty to instruct the plaintiff in regard to the danger of being hurt by flying chips of steel from the battered chisel. "We think," said the court, "that want of reasonable care on the part of the master cannot be predicated on the fact that the master failed to warn a servant mechanic of the age, intelligence, and experience of this plaintiff that bits of steel were liable to fly from the mushroomed head of a cold chisel when struck with a hammer."[24]

Assumption of Risk.—The courts generally follow the rule that an employe assumes the risk of obvious dangers, those which he knows and appreciates, and those which by reasonable care and attention he ought to know and appreciate.

"A servant assumes the risks of injuries from simple and ordinary appliances and methods, the nature of which he understands, or which is easily understood."[25]

And this rule is applied in some states even though the employer has notice of the defect.[26]

In one case it was contended that the plaintiff assumed the risk of injury from a flying particle of steel from a pin maul with which he was working. In this regard the court said: "This, however, cannot be true if there is any substantial evidence of negligence on the part of the defendant with respect to furnishing plaintiff with reasonably safe appliances with which to do his work. Where negligence is shown on the part of the master, a recovery cannot be denied the servant on the ground of assumption of risk, though he may be precluded by reason of his contributory negligence."[27]

Where the plaintiff, in an action to recover for the loss of one of his eyes by its being struck by a piece of steel from a drift pin which he was driving, was 19 years old and intelligent, and saw that the pin was battered, and he knew from his experience, or should have known, that blows on the frayed head of a pin would probably cause small pieces of steel to fly therefrom, it was held that he assumed the risk of such injury.[28]

Temper of Tools.—Ordinarily an employe is not charged with the duty of inspecting or testing a tool to ascertain whether or not it is properly tempered.[29] It is the employer's duty to furnish the employe with reasonably safe tools, and if inspection is required of anyone it is his duty to inspect the tools. The temper of a tool is something that cannot be ascertained by an ordinary workman or by merely looking at

(24) Cooney v. Portland Terminal Co., Me., 1914, 92 Atl. 178.

(25) Golden v. Ellis, 104 Me. 177, 71 Atl. 649.

(26) Schumann v. International Harvester Co., 174 Ill. App. 140.

(27) Crader v. St. Louis & S. F. R. Co., Mo. App. 1914, 164 S. W. 678.

(28) Barrett v. Chicago Bridge & Iron Co., 181 Ill. App. 204.

(29) Freeman v. Wilson, Tex. Civ. App., 149 S. W. 413.

a tool. It requires a certain kind of test, and the duty to test a tool for this purpose is the employer's. It follows, therefore, that if the defect in a tool consists in its being improperly tempered, and such defect results in injury to an employe, the employer is liable, unless the duties of the employe were such that he was required to know of the quality of the tool in this respect. A tool may be a simple one in every other respect, but as testing it to ascertain whether it is properly tempered for the use it is intended is not a simple matter, the simple tool rule has no application to a defect of this character.

If a servant suffers an injury caused by a tool being improperly tempered, and owing to his inexperience and lack of knowledge he could not tell whether or not it was properly tempered, he cannot be charged with contributory negligence or with having assumed the risk.[30]

Where an employer furnished an employe with a pin maul, and the latter was injured while using it by a particle of steel flying therefrom, it was urged that the employer was not liable because the pin maul was a simple tool. It was held, however, that the rule had no application where the particle of steel was caused to fly from the maul by its being improperly tempered, as this was a defect which the employe could not have discovered by such an examination thereof as he would be required to make to discover defects or insufficiencies therein.[31]

In an action to recover for personal injuries it appeared that plaintiff and another workman were engaged in cutting a steel rail with a chisel and sledge hammer—one holding the chisel while the other struck it with the sledge—and that plaintiff was injured by a scale flying from the chisel and striking him in the right eye; that the chisel was battered and mushroomed; that the manufacturer of the kind of chisels in question tested from three to five or six out of every lot turned out, by striking the chisel on the head with a 12 pound sledge 5,000 or 6,000 blows; that if a chisel of this kind is too hard it is very dangerous to work with. It was held that the chisel was not a simple tool, the court saying: "It will not do to assert that chisels of this dangerous character fall within the 'simple' tool rule, and say that an employer putting such instruments into the hands of a workman is under no obligations to observe reasonable care in seeing that they are suitable for the purposes for which they are to be used."[32]

Tools Manufactured by the Master.—Where simple tools are procured by a master from some one else and furnished to his servant to use, it has been held that the servant assumes the risks of all defects therein. The theory being that if the defect is latent neither the master nor the servant knows of it, and if it is patent at the start, or develops by use, the servant has at least an equal opportunity with the master of observing it.[33]

But when the master manufactures a tool, or remodels it, and in so doing leaves it in a dangerous and defective condition, a different rule applies, for the master then knows what has been done and how it was done, and the servant does not. The equality of knowledge and the means of knowledge is then lacking.[34]

It is therefore held that an employer is liable for injuries caused by a defective tool which he himself manufactured.[35]

In a Washington case the plaintiff was injured while using a clamp and key by a small piece of steel flying from the key when struck with a hammer, owing to

(30) Sterling v. Parker-Washington Co., Mo. App., 1914, 170 S. W. 1156.

(31) Crader v. St. Louis & S. F. R. Co., Mo. App., 1914, 164 S. W. 678.

(32) New York, N. H. & H. R. Co. v. Vizvari, 210 Fed. 118, 126 C. C. A. 632.

(33) Stankowski v. International Harvester Co., 180 Ill. App. 439.

(34) Stankowski v. International Harvester Co., 180 Ill. App. 439.

(35) Herricks v. Chicago & E. I. R. Co., 257 Ill. 264, 100 N. E. 897.

the fact that a hard piece of steel had been welded thereon, when it was repaired by defendant's blacksmith, when soft steel should have been used. Plaintiff testified that he examined the key after he was injured, and then discovered that the piece of steel welded on was too hard. The court applied the simple tools doctrine and held that the plaintiff could not recover.[36]

This case may well be criticised. When the employer repaired the key the servant could assume that the work was properly done, and was not negligent in acting upon such assumption. If the defect was not so obvious that the servant would notice it in working with the pin, he was not negligent. It certainly cannot be claimed that the employer is under no duty to exercise reasonable care in furnishing appliances to his servants, especially when he himself manufactures or repairs them. If repairing the key by welding a hard and brittle piece of steel on it was a breach of this duty, the injured servant was entitled to recover.

Tools Being Used by Another.—Where a workman was injured by a defective hammer which was wielded by another workman, it was held that the simple tools rule did not apply, because it could not be said that the injured employe observed, or ought in the exercise of reasonable care to have observed, the condition of the hammer in the hands of his fellow workman.[37]

Pleading and Proof.—While there are cases holding that an employe, suing to recover for an injury caused by a simple tool, must allege and prove, not only that the defect or danger was known to the defendant, but that it was unknown to the plaintiff, the better reasoning and the weight of authority seem to be that it is not incumbent upon the plaintiff to negative the existence of knowledge on his part that the tool was defective.[38]

In Rosellini v. Salsich Lumber Co.[39] it was said by the court: "The primary duty of inspection or of furnishing a safe instrumentality for doing the work is upon the master; and no contrary presumption arises unless it is shown by competent evidence that the duty is upon the servant in a given case, or that the character of the instrument and the manner of its use were such as to charge the servant with a knowledge of its defects."

In other words, the simple tools rule is an affirmative defense, to be pleaded and proved by the employer. This rule is not affected by the fact that the employe's own pleadings or proof may show that the rule ought to be applied. In such a case it will be applied to defeat his action, just as the contributory negligence rule (an affirmative defense) may be applied to defeat an action, although it was not pleaded by the defendant, where the plaintiff's evidence shows that he was contributorily negligent.

C. P. BERRY.

St. Louis, Mo.

(36) Bougas v. Eschbach-Bruce Co., 77 Wash. 347, 137 Pac. 472.

(37) Pushcart v. New York Shipbuilding Co., 81 N. J. L. 261, 81 Atl. 113.

(38) Sterling v. Parker-Washington Co., Mo. App., 1914, 170 S. W. 1156.

(39) 71 Wash. 208, 128 Pac. 213.

BILLS AND NOTES—HOLDER IN DUE COURSE.

EDWARDS v. HAMBLY FRUIT PRODUCTS CO. et al.

Supreme Court of Tenessee. Nov. 15, 1915.
180 S. W. 163.

(Syllabus by the Court.)

Under Negotiable Instruments Law (Acts 1899, c 94) § 60, providing that the maker of a negotiable instrument, by making it, engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse, the innocent holder of a negotiable note may recover thereon, though the payee was a foreign corporation, which, though required to do so, had not complied with the law in respect to filing a copy of its charter of incorporation.

WILLIAMS, J. One who shows himself to be innocent holder of a note negotiable in form may recover thereon, notwithstanding the fact

that the note was executed in this state to a payee that was a foreign corporation, which had not, though required to do so, complied with the laws of this state in respect of the filing here of a copy of its charter of incorporation.

Whatever may be the rule as to the maintenance of suit by such corporate payee itself (Orr's Administrator v. Orr, 157 Ky. 570, 163 S. W. 757), or whatever may have been the rule as to the right of an innocent holder in that regard before the passage of our Negotiable Instruments Law (Acts 1899, c. 94), as to which see First National Bank of Massillon v. Coughron (Ch. App.) 52 S. W. 1112, we think it manifest that, since the passage of that law, a recovery will be awarded to one into whose hands, as an innocent holder, such a note comes. Section 60 of that act governs, in its stipulation as follows:

"The maker of a negotiable instrument, by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse."

This statutory provision has been so construed by the courts of several jurisdictions. Young v. Gaus, 134 Mo. App. 166, 113 S. W. 735; National Bank of Commerce v. Pick, 13 N. D. 74, 99 N. E. 63; Brannan, Neg. Inst. Law § 60. And see Halsey v. Henry Jewett Co., 190 N. Y. 231, 83 N. E. 25, 123 Am. St. Rep. 546.

This, if we were to treat the execution of the note to the corporate payee to have been a part of a doing of business in this state on its part, so as to fall within the purview of our foreign corporation acts.

Decree of the Court of Civil Appeals, in not holding the indorses an innocent holder, is reversed, and the bill of complaint of Edwards, the maker of the note, seeking to cancel the note, is dismissed.

NOTE.—*Right of Bona Fide Holder of Negotiable Paper Transferred by Foreign Corporation to Sue Thereon.*—As seen, the instant case avoids passing upon the correctness *vel non* of a former Tennessee decision, by ruling that the Negotiable Instruments Law now gives to an innocent holder of negotiable paper the right to sue thereon in the courts of the state where the transferrer, a foreign corporation, would itself have no such right. We will endeavor to cite cases both under such law and upon the broad principles of commercial law.

Thus the case of Young v. Gans, 134 Mo. App. 166, 113 S. W. 735, which, while citing N. I. L. as creating an estoppel, argues additionally that independently of such law there would be the same estoppel. "By signing the note and delivering it to the corporation to be negotiated, the appellants represented to any one to whom the note might be offered for sale, that it was a valid obligation and the corporation was the legal holder thereof and authorized to negotiate it." The peculiar facts of this case showing the note was made by officers and directors of the foreign corporation and intended to be negotiated would not perhaps be thought to create more strongly an estoppel, than where any maker might make a note to a corporation or its order. It brings out the estoppel feature more plainly or more directly suggests it.

Bank of Commerce v. Pick, 13 N. D. 74, 99 N. W. 63, shows a narrow construction of the statute of North Dakota making void contracts by a foreign corporation not complying with its law in behalf of such corporation and its "assigns." It holds that: "The word 'assigns' as used in this statute does not include the holder in due course of a negotiable instrument."

In Lauter v. Jarvis-Conklin M. T. Co., 85 Fed. 894, 29 C. C. A. 473, Lurton and Taft, C. JJ., and Hammond, D. J., sitting, it was held in opinion by Judge Lurton, that, while it was declared unlawful by Tennessee statute upon penalty of fine for a foreign corporation to do any business in that state, yet as the statute did not specifically make a prohibited transaction null and void, the innocent holder of a note made payable to a foreign corporation or order could sue and recover thereon. It is to be noted that this ruling was in 1897, prior to 1899, at which latter date N. I. L. was adopted in Tennessee. It was said: "The Tennessee statute relied on as making this note void contains no provision either expressly or impliedly declaring a note made in the course of such a prohibited business void in the hands of an innocent holder for value. Analogous statutes from various states and decisions upon them are cited and discussed.

West & Craig Mfg. Co. v. Banus, 177 Ill. App. 626, refers to several sections of the N. I. L. as making a negotiable paper in the hands of an innocent holder outside of the law making contracts by a foreign corporation void and nonenforceable. There is no particularity of discussion as in the Lauter case, *supra*.

In Carrollton Press Brick Co. v. Davis, Tex. Civ. App., 155 S. W. 1046, it is said: "There may have been some doubt at one time as to whether an innocent purchaser for value of a negotiable note, given to a foreign corporation not having a permit to do business in the State of Texas, could sue and recover on said note in the courts of Texas when the corporation itself could not maintain a suit thereon in said courts; but the right of such a purchaser to so do was definitely settled by the Supreme Court in State Bank of Chicago v. Holland, 103 Tex. 266, 126 S. W. 564."

It may, therefore, be said that, unless a statute is explicit in declaring, that a prohibitive statute makes such a note in whosoever's hands it comes unenforceable, construction will save it in the hands of an innocent holder, and N. I. L. if not construed as amending, *pro tanto*, prior statutes in regard to contracts of foreign corporations, yet the principle of estoppel underlying the provisions of such law, will bend the meaning of such statutes so as not to embrace commercial paper in the hands of innocent holders. C.

JETSAM AND FLOTSAM.

EARLY CONNECTICUT LAW.

Among the trial justices of Connecticut in the early part of the eighteenth century was Richard Bushnell a man who has been described as townsman, constable, schoolmaster, poet, deacon, sergeant, lieutenant, captain, town agent, town deputy and court clerk.

His court records are instructing for their quaint simplicity and frankness, as well as for the light they throw upon the sentiments and customs of the day, and the tenderness of the public conscience. Here are a few:

"3rd of June, 1708. Joseph Bushnell, of Norwich, complained against himself to me, Richard Bushnell, Justice of the Peace, for he had killed a buck contrary to law. I sentenced him to pay a fine of 10 shillings, one half to ye county treasury and one half to complainant."

"July 20, 1720. Samuel Sabin appeareth before me, R. B. Justice of the Peace, and complaineth against himself that the last Sabbath at night, he and John Olmsby went on to Wawecoas Hill, to visit their relations, and were late home, did no harm, and fears it may be a transgression of ye law and if it be is very sorry for it and don't allow himself in unseasonable nightwalking."

An inferior court held at Norwich ye 19 Sept. 1720. Present, R. Bushnell, Justice of ye Peace, Samuel Fox, juror pr. complaint, Lettis Minor and Hannah Minor, plaintiffs, for illegally and feloniously about ye 6 of Sept'r inst. taking about 30 water-millions which is contrary to Law and is to his damage he saith ye sum of 20 shillings and prays for justice. This court, having considered ye evidence, don't find matter of fact proved, do therefore acquit the defendants and order ye plaintiff pay the charge of Presentment.

On one occasion an Indian, having been found drunk, was sentenced by the justices, according to the statute, to pay a fine of ten shillings, or receive ten lashes on his naked body.

The Indian immediately accused Samuel Bliss of selling him two pots of cider. Now the fine for the latter offense was twenty shillings, one-half to go to the complainant. The Indian thus obtained the exact sum necessary to pay his fine.

Other Connecticut justices were not less severe and impartial. Among the records of Justice Isaac Huntington there are found the following:

1738, July 12, John Downer and Solomon Hambleton for profaning the Sabbath day by oystering, fined 5 shillings and costs.

2nd day of November, 1738, Mary Leffingwell, on ye 24th day of September last, it being the Saboth or Lord's Day (and not being necessarily detained) did not attend ye public worship shall pay as fine to ye treasury of ye town of Norwich the sum of 5 shillings and cost of suit.

A Canterbury citizen, Paul Davenport, appeared before Justice Huntington, and accused himself of having ridden home from Providence on the Sabbath day. He was fined twenty shillings.

Two young men and two maids, presumably to "meet and convene together and walk in the street in company, upon no religious occasion," were fined three shillings each.

EDWIN TARRISSE.

Washington, D. C.

BOOK REVIEW.

CORPUS JURIS, VOLUMES 1, 2 AND 3.

This pretentious and prodigious undertaking, which, but a few years ago, when it was first broached, seemed like an idle dream, is actually being performed. The term, Corpus Juris, is very inclusive and would seem to require a more narrowly descriptive term to limit its signification as an encyclopedia of American law. But the vast range of its subject-matter and the still wider range and scope of its method of treatment justifies its somewhat pretentious title. It is more than a compendium of American case law. It makes frequent excursions into the realm of legal history and legal science in seeking to account for the reasons underlying legal principle, or to search for analogies in support of solutions for new legal problems.

The work is intended to be more complete and exhaustive, as well as more scholarly than its predecessor, Cyc (Cyclopedia of Law and Procedure), which was brought out by the same publishers.

The first announcement estimated the set to contain 62 volumes, but it is likely to exceed this number. When it is taken into consideration that each page of Corpus Juris contains one hundred per cent more matter than a page of Cyc, and that each volume of Corpus Juris contains over 1,400 pages, the exhaustive character of the new undertaking becomes strikingly apparent.

One of the distinct advantages of this new encyclopedia is that it will be an exhaustive dictionary of legal terms. There will be approximately 25,000 vocabulary entries of this class. This is in addition to the numerous definitions and applications of particular words, phrases and maxims found in the text and notes of the various treatises throughout the work.

Still another advantage is that it is the best "Maxim" encyclopedia since Broom's work appeared. All legal maxims are presented in their original language with an accurate translation in English.

As there does not appear upon the horizon any relief in codification or any other scheme from the constantly increasing weight of case law, the only alternative is a scientific and exhaustive restatement of the principles decided in the vastly accumulated and accumulating mass of precedents.

The volume of law in thousands of cases presents to a compiler for its ready use a problem both scientific and painstaking. It somewhat resembles the making of an index to a great work—no man may make one that is altogether satisfactory to every user. But every objection cannot be noticed because inclusion of what may be omitted does not always solve the difficulty in an objector's mind. Superabundance may be as bad as paucity, if the latter, at least, is judiciously suggestive in what is included.

Here, however, is a work that is abundant to the limit of decided cases and these are cited to what they plainly decide and all the distinct propositions therein, and the different propositions are joined together in logical sequence. The user of the work need, therefore, possess himself of some discrimination of a logical sort in his mind to look in the right place for what he is in need. When he looks there he is led along the path of knowledge and when he comes to the end he feels assured that his need must be unprecedently novel if authority in reason does not cover that need.

We greet with pleasure this effort to give "a consistent and correlated statement of the whole law," and as the work unfolds, as additional subjects are taken up, we feel convinced that extensions in subsequent decisions will call for this work to see whether it is true to the touchstone that should be found in the reason of the law.

The volumes which have appeared are in paging considerably larger than in Cyc and page per page contain on an average twice as much matter. Comparison with Cyc by subjects treated show on an average three times as many text propositions and about the same proportion as to authorities cited.

The paper used in the publication is so highly esteemed by the Michigan Legislature that its quality, grade, weight and finish is taken as the new standard for its new issue of Compiled Laws.

This work goes out from the great publishing house, American Law Book Company of New York.

HUMOR OF THE LAW.

In his law practice Lincoln discouraged his neighbors who wished to go to law. One day a farmer drove in to get a divorce. He had built a frame house and wished it painted white. His wife wanted it brown. There had been an argument and then there had been trouble. Mr. Lincoln said to him:

"You have not lived with this woman all these years without learning that there is such a thing as a compromise. Go back home; think no more of this divorce for a month. Then come to me again." In a month the farmer returned. "Mr. Lincoln," said he, "we have agreed on a compromise. We are going to have the house painted brown."

The man who had made a huge fortune was speaking a few words to a class of students at a law school. Of course the main theme of his address was himself.

"All my success in life, all my tremendous financial prestige," he said proudly, "I owe to one thing alone—pluck. Just take that for your motto, pluck, pluck, pluck!"

He made an impressive pause here, but the effect was ruined by one student, who asked impressively:

"Yes, sir; but please tell us how and whom did you pluck?"

In Iowa, a merchant sent a dunning letter to a man, who replied by return mail: "You say you are holding my note yet. That is all right—perfectly right. Just keep holding onto it, and if you find your hands slipping, spit on them and try it again. Yours affectionately."—American Legal News.

Missouri Court of Appeals holds that in suit for loss of a wife's services it is not necessary to make definite proof, "as any intelligent citizen might be presumed to know their reasonable value as a matter of common knowledge."

We suppose that the intelligent citizen need not be a married man.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Alteration of Instruments**—Materialty.—The release from liability by the holder of a joint note of one of the makers and the partial release of the security therefor held not a material alteration as against indorsers.—Davis v. Byrne, Wash., 152 Pac. 14.

2. **Assignments** — Contracts. — Contracts, silent on the subject, are generally assignable.—Standard Sewing Mach. Co. v, Smith, Mont., 152 Pac. 38.

3. **Attachment** — Damages. — An attaching creditor cannot be held liable for wrongful acts of the sheriff not shown to have been done at his direction.—Webb v. Van Vleet-Mansfield Drug Co., Ark., 179 S. W. 357.

4. **Attorney and Client**—Lien.—An attorney's general lien on his client's papers in his possession is merely passive and retaining, and may not be actively enforced.—Id. Everett, Clarke & Benedict v. Alpa Portland Cement Co., U. S. C. C. A., 225 Fed. 931.

5. **Bankruptcy**—Appointments.—Ex parte appointment of a receiver for property of an alleged bankrupt, then in possession of a state receiver, held erroneous.—Ingram v. Ingram Dart Lighterage Co., U. S. D. C., 226 Fed. 58.

6.——Contempt.—Noncompliance with order requiring bankrupt to turn over goods held not to require attachment, unless there is proof of present contumacy on the part of the bankrupt.—In re Heyman, U. S. D. C., 225 Fed. 1000.

7.——Deception.—Intent to deceive being included in "false," within Bankr. Act, § 14 b (3), barring right to discharge of bankrupt obtaining credit on false statements, his signing as president statements of financial condition of a corporation, wholly relying on advice of his financial adviser, will not have the effect.—In re Stafford, U. S. D. C., 226 Fed. 127.

8.——Exemption.—Conveyance recorded within four months before bankruptcy held voidable as to excess of land over homestead right.—Sieg v. Greene, U. S. C. C. A., 225 Fed. 955.

9.——Registration of Instruments.—Under Bankr. Act, § 67d, corporate deed of trust, not properly registered until within four months before bankruptcy, held valid, so far as bonds secured thereby were based upon a present consideration.—National Bank of Goldsboro v. Hill, U. S. D. C., 226 Fed. 102.

10.——State Law.—Where a chattel mortgagor assigned for the benefit of creditors under Comp. St. 1910, §§ 3366-3396, specific prior lien of mortgage was enforceable against the property in the hands of the assignee claiming under the state insolvency law, suspended by the National Bankruptcy Act of 1898.—Hasbrouck v. La Febre, Wyo., 152 Pac. 168.

11.——Taxes.—Under Bankr. Act, §§ 64a, 64b (1-5), the perpetual lien for taxes under the law of a state was prior to the lien of an existing mortgage.—Delahunt v. Oklahoma County, U. S. C. C. A., 226 Fed. 31.

12. **Banks and Banking**—State Examiner.—Where the bank examiner was satisfied that a bank was insolvent, it became his mandatory duty, under Laws 1911, c. 124, §§ 72-74, to close the bank, and his failure to do so rendered him liable on his bond to depositors losing money in consequence thereof.—State v. Title Guaranty & Surety Co. of Scranton, Pa., Idaho, 152 Pac. 189.

13. **Bastards**—Legitimacy.—The presumption of the legitimacy of a child born during wedlock is indulged, though antenuptial conception is made to appear.—Jackson v. Thornton, Tenn., 179 S. W. 384.

14. **Bills and Notes**—Burden of Proof.—Where a note was tainted by fraud in its inception, a purchaser has the burden of making an affirmative showing of an acquisition in good faith, though defendant's evidence is weak.—Farmers' & Merchants' State Bank v. Shaffer, Iowa, 154 N. W. 485.

15.——Merger.—Carrier's cause of action for freight held merged in right to sue on the check given on which payment was stopped.—Nashville, C. & St. L. Ry. Co. v. Johnson, Ind. App., 109 N. E. 912.

16.——Negotiability.—A buyer of purchase-money notes before maturity, with knowledge of the payee's agreement to buy back the property, held not affected by such agreement, where it was not to affect the negotiability of the note.—A. Marx & Sons v. N. Frey, La., 69 So. 757.

17.——Release of Indorser.—A release of the maker of a promissory note without the consent of the indorser releases the indorser, unless the remedy against him is expressly reserved.—Davis v. Byrne, Wash., 152 Pac. 14.

18.——Time of Payment.—Where no time is specified in a written obligation for the payment of money, the parties are presumed to have intended that the money should be payable immediately.—Rhone v. Keystone Coal Co., Pa., 95 Atl. 530.

19. **Breach of Marriage Promise**—Inheritance.—Though one breaching a contract to marry dies before action therefor, plaintiff is not as matter of law entitled to recover one-third of the value of his estate.—Parsons v. Trowbridge, U. S. C. C. A., 226 Fed. 15.

20.——Performance.—It is not essential that the time for performance of a contract of marriage be stated, for the law implies, in the absence of such statement, that it shall be performed in a reasonable time under all the circumstances.—Bowes v. Sly, Kan., 152 Pac. 17.

21. **Bribery**—Evidence.—To constitute the offense of attempted bribery, it is immaterial whether the official action sought to be influenced was right or wrong.—Weil v. Black, W. Va., 86 S. E. 666.

22. **Brokers**—Dual Agency.—Where a property owner, with knowledge of a custom of real estate agents to charge both parties commissions on exchange of property, allows a broker to render services and remains silent, the broker is entitled to recover a commission from him.—Ramey v. Sturgeon, Ga. App., 86 S. E. 660.

23.——Dual Agency.—A broker cannot recover an agreed commission from both parties without a showing consent from both; dual agency being contrary to public policy as against the interest of the principals.—Leno v. Stewart, Vt., 95 Atl. 539.

24. **Carriers of Goods**—Bill of Lading.—Where goods are shipped on a bill of lading, filing a claim for damages within the time therein stipulated is a prerequisite to recovery.—Culbreth v. Atlantic Coast Line R. Co., N. C., 86 S. E. 624.

25.——Connecting Carrier.—Under the Carmack amendment to the Interstate Commerce Act, an action for delay in an interstate shipment of live stock will not lie against an intermediate carrier not responsible for such delay, regardless of whether it had issued a bill of lading or not.—Hudson v. Chicago, St. P., M. & O. Ry. Co., U. S. D. C., 226 Fed. 38.

26.——Custody.—Where property is committed exclusively to the custody of a carrier, the burden is on it to allege and prove the existence of any exception relieving it from the liability of an insurer.—Nashville, C. & St. L. Ry. Co. v. Johnson, Ind. App., 109 N. E. 912.

27.——Delivery.—A carrier should not deliver a shipment to the consignee's order without production of the bill of lading properly indorsed.—Judson v. Minneapolis & St. L. R. Co., Minn., 154 N. W. 506.

28.——Waiver.—Provision of contract, requiring shipper of stock to give written notice of injuries to nearest station agent or other agent of carrier, may be waived by the company.—St. Louis, I. M. & S. Ry. Co. v. Nunley, Ark., 179 S. W. 369.

29. **Carriers of Passengers**—Boarding Train.—One who attempts to board a moving train is not a passenger, though he may have purchased a ticket entitling him to passage thereon.—Kentucky Highlands R. Co. v. Creal, Ky., 179 S. W. 417.

30.——Negligence Per Se.—It is not negligence per se for a street car passenger to stand with one foot on the steps, one hand holding onto the handrail, and one foot swinging in the air, preparatory to alighting at his destination.—Jelinek v. Omaha & C. B. St. Ry. Co., Neb., 154 N. W. 545.

31.——Protection.—A carrier of female passengers impliedly stipulates that he will protect them against general obscenity and immodest conduct.—Louisville & N. R. Co. v. Bell, Ky., 179 S. W. 400.

32. **Chattel Mortgages**—Future Advances.—A mortgage given in good faith to secure future advances is valid, though it does not show its object.—Scofield Implement Co. v. Minot Farmers' Grain Ass'n, N. D., 154 N. W. 527.

33.——Priority.—A mortgagee of horses, who consents to a liveryman keeping them, subjects his mortgage to the liveryman's lien for board.—Drummond v. Griffin, Me., 95 Atl. 506.

34. **Commerce**—Natural Gas.—The sale in Kansas of natural gas produced in Oklahoma, if interstate commerce, is not of that kind which requires exclusive legislation by Congress.—State v. Flannelly, Kan., 152 Pac. 22.

35. **Contracts**—Confidential Relations.—Where confidence and influence exist, equity requires the highest good faith in all dealings of the one in whom the confidence is reposed.—In re Spann, Okla., 152 Pac. 68.

36.——Construction.—In construing a contract which is partly printed and partly written, the writing will be given greater weight only in case of irreconcilable conflict.—Gabbert v. William Seymour Edwards Oil Co., W. Va., 86 S. E. 671.

37.——Indefiniteness.—A contract so vague and uncertain that the rights and obligations of the parties, attempted to be expressed, cannot be determined with any degree of certainty, cannot be the basis of an action.—De Bearn v. De Bearn, Md., 95 Atl. 476.

38.——Mutuality.—A contract providing that one party shall pay purchase money for real estate as it matures by the terms of the contract, and that the other party shall execute deeds for the land at a rate stipulated in the contract, is not void for want of mutuality.—Federal Realty Co. v. Evins, Ark., 179 S. W. 344.

39.——Receipt.—A simple receipt is an admission only and not a contract.—Robertson v. Vandeventer, Okla., 152 Pac. 107.

40.——Waiver.—Waiver of breach of contract held a matter of defense, not required to be negatived in order to state a prima facie case.—Young v. Older, Ind., 109 N. E. 909.

41. **Contribution**—Concurrent Negligence.—Where a telephone lineman was electrocuted through the negligence of the telephone company and a light company, no contribution can be enforced between the wrongdoers; their neg-

ligence being concurrent.—Cumberland Telephone & Telegraph Co. v. Mayfield Water & Light Co., Ky., 179 S. W. 388.

42. **Conversion**—Equitable.—Where testator directs the sale of specific land to pay bequests, equity will deem that a conversion of the land into personalty has taken place at testator's death, though the sale is postponed for a definite time.—Coyne v. Davis, Neb., 154 N. W. 547.

43. **Corporations**—De Facto.—A corporation de facto is one exercising corporate powers under color of a more or less legal organization.—Cason v. State, Ga. App., 86 S. E. 644.

44.——Dissolution.—The dissolution of a corporation does not affect its property rights, which vest in trustees for the benefit of those interested.—Iowa Telephone Co. v. City of Keokuk, U. S. D. C., 226 Fed. 82.

45.——Repudiation.—Mere silent assent to incurring of indebtedness, or failure to repudiate a debt incurred without prior consent, will not render directors of association personally liable for the debt.—De Witt Grocery Co. v. Ware, Vt., 95 Atl. 537.

46.——Sale of Stock.—Proper and timely tender of stock in a company held necessary to pass title to buyer under executory contract of sale.—Tuthill v. Sherman, S. D., 154 N. W. 518.

47. **Criminal Law**—Flight.—It is only a flight to avoid arrest on a charge of a crime that is evidence of the identity of the person charged with being the perpetrator, when that question is in doubt, and not flight shown to be for another purpose.—Trapp v. Territory of New Mexico, U. S. C. C. A., 225 Fed. 968.

48.——Principal and Accessory.—One cannot be convicted as an accessory until the guilt of the principal is established.—Commonwealth v. Minnich, Pa., 95 Atl. 565.

49.——Venue.—A person who without the state counsels and procures an agent to attempt bribery within the state is punishable in the county where the offer was made.—Weil v. Black, W. Va., 86 S. E. 666.

50.——Witnesses.—For sole purpose of ascertaining their credibility, the court may examine supporting witnesses to affidavit for change of venue as to their means of knowledge and the probability of petitioner having fair trial.—Dewein v. State, Ark., 179 S. W. 346.

51. **Damages**—Mitigation.—Where a party saves himself from loss from breach of contract, he can recover his expenses from the party liable, and also such damages as with reasonable endeavor and expense he could not prevent.—Collins v. Twin Falls North Side Land & Water Co., Idaho, 52 Pac. 200.

52.——Nominal.—By "nominal damages" is meant a trivial sum properly awarded in certain cases for mere technical injury.—Blake v. Atlas Supply Co., Okla., 152 Pac. 81.

53. **Deeds**—Parol Evidence. — Where the meaning of a deed is not clear, evidence of the subsequent acts of the parties construing the deed is admissible.—Wilson v. Marsee, Ky., 179 S. W. 410.

54.——Undue Influence.—In suits to set aside instruments conveying property for lack of mental capacity, undue influence, etc., plaintiff need only establish his case by the greater weight of testimony.—Glenn v Glenn, N. C., 86 S. E. 622.

55. **Divorce**—Defenses. — A husband who, under agreement with his wife for repayment out of rents, expended money in permanent improvements upon her property, held entitled to recover in her suit for divorce the amount so spent.—Sandusky v. Sandusky, Ky., 179 S. W. 415.

56. **Easements**—Injunction.—Decree making "permanent" temporary injunction restraining interference with easement held not erroneous, though easement was granted so long only as certain buildings should stand.—Miller v. Holmes, Vt., 95 Atl. 541.

57. **Electricity**—Discrimination.—An electric light corporation cannot charge one patron one price and a competitor another price, though the higher price be not unlawful.—Homestead Co. v. Des Moines Electric Co., U. S. D. C., 226 Fed. 49.

58. **Embezzlement**—Intent. — Fraudulent intent in converting, essential to a conviction of embezzlement, may be established by circumstantial evidence.—State v. Rowell, Iowa, 154 N. W. 488.

59. **Equity**—Remedy.—The loss of a remedy at law through the misrepresentations of an adversary is ground for invoking the aid of equity.—Curtis v. Olds, 95 Atl. 526.

60. **Executors and Administrators**—Defenses. —Before decedent's creditor has recovered judgment, the personal representative can prevent it by representing the estate insolvent. —National Casket Co. v. Sweet, Mass., 109 N. E. 942.

61. **Fixtures** — Chandeliers. — Combination chandeliers and brackets in the cellar of a residence and in a sugar house held to partake of the immobility of the plants and not to be reclaimable by the vendor of the plantation on the ground that they could be unscrewed without injury.—Scovel v. Shadyside Co., La., 69 So. 745.

62. **Fradulent Conveyances**—Presumption. — Though a husband continued in possession after sale of a stock of drugs to his wife, it cannot be held presumptively fraudulent for that reason, where the drugs were in the wife's building, and she objected to the levy of an attachment by the husband's creditors.—Webb v. Van Vleet-Mansfield Drug Co., Ark., 179 S. W. 357.

63.——Presumption of Gift.—Where a husband is in embarrassed financial circumstances when he makes improvements on his wife's land, the money or improvements furnished will be deemed a gift in fraud of his creditors. —Curtis v. Olds, Pa., 95 Atl. 526.

64.——Subsequent Acquired Property. — A mortgage will not bind property included in it and subsequently acquired by the mortgagor, as against subsequent creditors without notice.—Gallagher v. Stern, Pa., 95 Atl. 518.

65. **Homicide**—Threats.—To render threats of defendant admissable, his subsequent acts, considered with the testimony and surrounding circumstances, must show that deceased was the person against whom defendant entertained malice.—State v. Buster, Idaho, 152 Pac. 196.

66.——Threats.—Evidence of threats and declarations of personal hostility made by defendant held admissible to show malice and criminal intent.—Commonwealth v. Minnich, Pa., 95 Atl. 565.

67. **Injunction**—Special Tribunal.—The United States Land Department is a special tribunal with judicial functions, but where it proceeds without jurisdiction the court has no power to restrain the proceedings by injunction, the law affording adequate remedy.—Cameron v. Weedin, U. S. D. C., 226 Fed. 44.

68. **Insurance** — False Representation. — Where, in an action by the insurer to cancel the contract because of a false warranty, insured shows that he made the warranty in good faith, the court may require, as a condition of cancellation, the return of premiums paid.—National Council of Knights and Ladies of Security v. Garber, Minn., 154 N. W. 512.

69.——Proof of Loss.—Where a fire policy provided that any false statements before or after loss should avoid the policy, uninten-

tional false statements in the proofs of loss will not preclude recovery.—Willis v. Horticultural Fire Relief of Oregon, Ore., 152 Pac. 259.

70.——Property Covered.—Policies of tornado insurance not purporting to cover subsequent construction held to cover property in process of construction at the time of their issuance, but not property the construction of which was begun after their issuance.—Northwestern Fuel Co. v. Boston Ins. Co. of Boston, Mass., Minn., 154 N. W. 515.

71.——Warranties.—Untrue answers in an application for a policy of insurance which warrants all answers therein to be "complete and true and material and binding" void the policy. —McManus v. Peerless Casualty Co., Me., 95 Atl. 510.

72. **Joint-Stock Companies**—Common Law.—At common law, and without statutory authority, persons may associate themselves in joint-stock companies with transferable shares.—Roberts v. Anderson, U. S. C. C. A., 226 Fed. 7.

73. **Judgment**—Clerical Error.—While the trial court may order that clerical mistakes in the entry of a judgment be corrected to show the judgment pronounced, judicial errors can be reached only by motion for new trial or appeal.—Wyllie v. Kent, Idaho, 152 Pac. 194.

74.——Conclusiveness.—A judgment is conclusive as to everything which might have been pleaded, or given in evidence in defense, or to lessen the damages, except that which might be pleaded in offset.—Campbell v. Martin, Vt., 95 Atl. 494.

75.——Opening Default.—Where a party having a meritorious defense employed a reputable attorney to present it, and the attorney agreed to appear, a default due to the attorney's failure will be vacated on the ground of excusable neglect.—Gaylord v. Berry, N. C., 86 S. E. 623.

76.——Vacation of.—In order to vacate a judgment for fraud practiced by the successful party, it is necessary that the defense of the action be sufficiently alleged and that such defense be adjudged a valid one.—Smith v. Minter, Ark., 179 S. W. 341.

77. **Larceny**—Good Character.—Where defendant's explanation that he bought the alleged stolen cattle was undisputed and was supplemented by testimony of his good character and honesty, his conviction was unauthorized.—Graham v. State, Okl. Cr. App., 152 Pac. 136.

78.——Possession of Stolen Property.—The mere possession of coffee, though not accounted for, will not authorize a conviction of stealing, where there is no evidence that it was stolen.—Berry v. State Ga. App., 86 S. E. 644.

79. **Libel and Slander**—Truth as Defense.—The publication of a true statement is not libelous if it is published with good motives and for justifiable ends, within Const. art. 1, § 5, though it would be libelous if untrue.—Deupree v. Thornton, Neb., 154 N. W. 557.

80. **Liens**—Creation of.—Liens and legal mortgages can exist only by express provision of law, and any law creating them must be strictly construed.—State v. C. S. Jackson & Co., La., 69 So. 751.

81.——Equity.—An equitable lien may be created by advancements on the faith of property, may attach to property not in being, and does not depend upon possession, but may exist by implication.—Sieg. v. Greene, U. S. C. C. A., 225 Fed. 955.

82. **Life Estates**—Permanent Improvements. —A life tenant is not bound to make any permanent improvements on the estate, and if he makes them it will be presumed that they are for his own benefit, and he cannot recover anything therefor from the remaindermen or reversioners.—Neel's Ex'r v. Noland's Heirs, Ky., 179 S. W. 430.

83. **Marriage**—Good Faith.—Marriage in good faith, contracted more than 10 years after mysterious disappearance of former husband of one party, though illegal, produces all legal effects of valid marriage, including community of acquets and gains.—Jones v. Squire, La., 69 So. 733.

84. **Master and Servant**—Assumption of Risk. —A laborer directed by his foreman to remove a wooden horse from its position across a freshly cut ditch assumed the obvious risk of its caving in from his placing his weight too close to the edge.—White v. Louisville Gas & Electric Co., Ky., 179 S. W. 418.

85.——Assurance of Safety.—That a master gives a servant an assurance of safety does not impose absolute liability, regardless of negligence, but only deprives the master of the advantage of the pleas of assumption of risk and contributory negligence, unless the defect was obvious.—Thomas v. National Concrete Const. Co., Ky., 179 S. W. 439.

86.——Dependency.—A widowed mother without means is wholly dependent on her son for support, where she is supported partly by his wages and partly by the yield of his land.—State v. District Court, Beltrami County, Minn., 154 N. W. 509.

87.——Obvious Danger.—Danger of employe slipping, where scrub-woman was mopping the floor, as she stepped back from the machine at which she was working, held so obvious that no warning was required.—Standard Knitting Mills v. Hickman, Tenn., 179 S. W. 385.

88.——Quantum Meruit.—Where, in an action for services, the complaint alleges an agreed price and the reasonable value, and the latter only is proven, recovery may be had therefor.—Krutz v. Lough, Minn., 154 N. W. 514.

89.——Workmen's Compensation Act.—The injury was one "arising out of," as well as in the course of, his employment, within the Workmen's Compensation Act, where a mill superintendent, on ordering out a trespasser, pursuant to his general duty and special instructions, was shot and killed by him.—In re Reithel, Mass., 109 N. E. 951.

90. **Monopolies**—Magnitude.—The size and extent of business of a corporation may properly be considered in determining whether it constitutes an illegal monopoly, where it has used the power resulting from a large business arbitrarily to eliminate weaker competitors.—U. S. v. Eastman Kodak Co., U. S. D. C., 226 Fed. 62.

91. **Mortgages**—Presumption of Payment.—A bond and mortgage payable at such time as the directors of the mortgagor should determine were presumably due and payable after the lapse of 18 years.—Rhone v. Keystone Coal Co., Pa., 95 Atl. 530.

92.——Priority.—A materialman's lien held prior to a mortgage taken during the construction of the building for which the material was furnished, though the material was not used in the building.—Minneapolis Sash & Door Co. v. Hedden, Minn., 154 N. W. 511.

93. **Principal and Surety**—Privity.—A contract being in its nature unassignable by one of the parties without the consent of the other, consent also of his sureties thereon is necessary to establishment of privity between the assignee and them in virtue of such contract.—Standard Sewing Mach. Co. v. Smith, Mont., 152 Pac. 38.

94.——Release of Surety.—A surety on a note was discharged, where the holder without the surety's consent surrounded collateral security, regardless of the value of the collateral.—Elsey v. People's Bank of Bardwell, Ky., 179 S. W. 392.

95. **Railroads**—Licensee.—A switching fireman killed by an engine of another railroad while crossing the yard to his engine after going to the station for a drink was not a trespasser or licensee, so that defendant owed him the duty of active care.—Ingram's Adm'x v. Ruthland R. Co., Vt., 95 Atl. 544.

96.——Signals.—While a pedestrian on railroad tracks between crossings is not entitled to crossing signals, yet, if the signals are not given and the train is operated without a headlight, such facts are evidence of negligent operation.—Treadwell v. Atlantic Coast Line R. Co., N. C., 86 S. E. 617.

97. **Reformation of Instruments**—Mistake.—Equity will reform a written instrument for mistake, because it does not state the true

agreement, only where the mistake is plain, and the proof full and satisfactory.—Interstate Lumber Co. v. Fife, Fla., 69 So. 715.

98. **Release**—Consideration.—The consideration paid for the release set up in defense is to be deducted from any greater amount recovered against the defendant.—Ingram v. Carlton Lumber Co., Or., 152 Pac. 256.

99.——Reserving Rights.—An injured employe's settlement with his employer and a release expressly reserving his right of action against a company causing the injury by furnishing a defective appliance held not to defeat his action against such company.—Wiseblood v. Omaha Merchants' Express & Transfer Co., Neb., 154 N. W. 539.

100. **Sales**—Acceptance.—Where the buyer accepts, without objection being made within a reasonable time, an article different from that ordered, he is liable for the price agreed on for the article ordered.—Spaulding v. Howard, Okl., 152 Pac. 106.

101.——Burden of Proof.—Where the issue was whether a sale was effected or whether there was merely an agreement to effect a subsequent sale by written contract, the burden was on the plaintiffs.—Pete Sheeran, Bro. & Co. v. Tucker, Ky., 179 S. W. 426.

102.——Cancellation.—A letter from a purchaser requesting cancellation, answered by a letter from the vendor saying, "We are also grieved that it is necessary to concel" the order, held a cancellation by consent.—Schwab Safe & Lock Co. v. Snow, Utah, 152 Pac. 171.

103.——Mitigating Damages.—Where plaintiff might have mitigated the damages from defendant's breach of a contract of sale by purchasing elsewhere, compensation will be limited to such damages as could not have been avoided.—Wilson v. Scarboro, N. C., 86 S. E. 611.

104. **Telegraphs and Telephones**—Avoidance of Injury.—The principle of avoidable consequences applies to the negligent failure of a telegraph company to deliver a dispatch, as to other cases of broken contract or tort.—Weeks v. Western Union Telegraph Co., N. C., 86 S. E. 631.

105. **Tenancy in Common**—Diversion of Water.—Where a tenant in common of a natural stream diverted water, he was a trespasser; his co-ownership not authorizing him to deal with the common property to the detriment of his co-owners.—Barton Land & Water Co. v. Crafton Water Co., Cal., 152 Pac. 48.

106.——Easement.—A tenant in common, by deed to which the other tenants were strangers could not place the burden of an easement of way on the estate so held in common, and make it servient to some other land.—Silverman v. Betti, Mass., 109 N. E. 947.

107. **Trover and Conversion**—Damages.—One's right to recover the value of his property converted is not affected by the fact that he purchased it for less than the value, or received it as a gift.—Elbert County v. Brown, Ga. App., 86 S. E. 651.

108. **Vendor and Purchaser**—Marketable Title.—Where the vendor breached his contract to furnish a clear and merchantable abstract of title, and his suit for a reformation of the contract, to continue it during certain litigation was denied, the purchaser was entitled to the return of the earnest money.—Mathers v. Christianson, Iowa,. 154 N. W. 455.

109.——Statutory Lien.—An action to enforce a statutory vendor's lien can be maintained only in the county where the land is located.—Newcomer v. Sheppard, Okla., 152 Pac. 66.

110. **Waste**—Remainderman.—A contingent remainder is an insufficient title to support action of waste against life tenant.—Briggs v. R. I., 95 Atl. 505.

111. **Waters and Water Courses**—Ice.—A riparian owner on a mill dam has a fixed right to take ice from the stream where it flows over his land, and the owners of the dam cannot avail themselves of such right, although they have a right to an undiminished amount of water.—Valentino v. Schantz, N. Y., 109 N. E. 866, 216 N. Y. 1.

112.——Negligence.—Where a railway company builds its bridges and abutments so as to cause debris to accumulate and back up water over neighboring property, it is guilty of actionable negligence.—Southern Ry. Co. v. Weidenbrenner, Ind. App., 109 N. E. 926.

113.——Riparian Rights.—Rights in water flowing from spring over plaintiff's land held to depend upon his riparian rights; no rights being obtainable by prescription.—Fraser v. Nerney, Vt., 95 Atl. 501.

114.——Riparian Owners.—Riparian owners held to have no right as against lower owners to furnish water from stream to people who were not riparian owners.—Town of Kirkland v. Cochrane, Wash., 151 Pac. 1082.

115.——Surface Water.—Where a public highway drained surface waters on to plaintiff's land, plaintiffs had the legal right to repel such surface water by diking their land, irrespective of their motive in so doing.—Harvie v. Town of Caledonia, Wis., 154 N. W. 283.

116.——Surface Water.—Where there is a right in the surface waters of a stream, such right includes that to the subterranean waters which support the surface stream.—Barton Land & Water Co. v. Crafton Water Co., Cal., 152 Pac. 48.

117.——Unlawful Diversion.—Where restoration of water wrongfully diverted by defendant into its reservoir might benefit no one, plaintiff's remedy by an action at law for damages from such diversion was adequate, precluding injunction.—Comstock v. Ft. Morgan Reservoir & Irrigation Co., Colo., 151 Pac. 929.

118. **Wills**—Burden of Proof.—There is a presumption of sanity or mental capacity, and one alleging the contrary must prove it.—In re Craven's Will, N. C., 86 S. E. 587.

119.——Construction.—Unless it clearly appears from the context of a will or the circumstances of the case that a contingent interest was intended, the remainder will be regarded as vesting at testator's death, and not at the expiration of the life tenancy.—In re Tatham's Estate, Pa., 95 Atl. 520.

120.——Lex Loci.——The validity of a will, as to personal property, is determined by the law of the testator's domicile at the time of his death, and, as to real property, by the law of the jurisdiction wherein it is situated.—Rutledge v. Wiggington, Ky., 179 S. W. 389.

121. **Witnesses**—Accused.—Where accused voluntarily becomes a witness, he subjects himself to any legitimate cross-examination, though it tends to incriminate him.—Hoskins v. State Fla., 69 So. 701.

122.——Credibility.—A credible person is one having capacity to testify on given subject and worthy of belief, and lack of knowledge on the subject of particular inquiry renders witness not credible in reference thereto.—Dewein v. State Ark., 179 S. W. 346.

123.——Cross-Examination.—A witness cannot be cross-examined as to collateral matters not referred to on direct examination.—People v. Ung Sing, Cal., 151 Pac. 1145.

124.——Cross-Examination.—A witness to accused's good repute may be cross-examined as to the existence of rumors of specific wrongful acts.—State v. Rowell, Iowa, 154 N. W. 488.

125.——Impeachment.—Where accused was offered permission to ask his impeaching witness the same question propounded to the state's witness whom he desired to impeach by proof of a conversation, he cannot complain that the court would not permit questions as to the minute details.—Bulger v. People, Colo., 151 Pac. 937.

126.——Impeachment.—A witness cannot be impeached by showing his conviction of a misdemeanor not involving moral turpitude.—Howard v. State, 86 S. E., Ga. 540.

127.——Interrogation by Judge.—The trial judge may interrogate a witness to elucidate matters, provided he does not intimate or express an opinion as to the proof of defendant's guilt.—Cason v. State Ga. App., 86 S. E. 644.